

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 786 of 1998

in

SPECIAL CIVIL APPLICATION No 8361 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

CADILA HEALTHCARE LTD

Versus

UNION OF INDIA

Appearance:

MR RR SHAH for Appellant
MR YJ TRIVEDI for Respondent No. 1
MR.AJAY SAHANI FOR RESPONDENT NO.3.

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.M.KAPADIA

Date of decision: 09/09/98

ORAL JUDGEMENT

Admitted Mr.Ajay Sahani, learned counsel for respondent no.3, who is a contesting respondent appears and waives service of notice of admission. So far as respondent nos.1 and 2, are concerned, the learned counsel for the appellant states that no relief is claimed in the present proceeding against respondent nos.1 and 2.

This appeal is filed against summary dismissal of Special Civil Application No. 836 of 1997. A petition was filed against interlocutory order passed by the Assistant Registrar of Trade Mark, respondent no.1 herein on 8th October 1997. Notice was issued and the respondent no.1 appeared. None appeared for respondent nos.2 and 3 even before the learned Single Judge.

On May 5, 1998, the matter was called out and the learned counsel for the petitioner sought time. Time was granted and the matter was adjourned on the next day i.e on 6th May 1998. On 6th May 1998, on behalf of the petitioner nobody was present. The learned Single Judge heard the learned counsel for the respondent and held that the petition was not maintainable and accordingly it was dismissed.

It is, this order, which is challenged in the present Letters Patent Appeal.

We have heard Mr.R.R.Shah, learned counsel for the appellant and Mr.Ajay Sahani for the contesting respondent. Mr.Shah stated that on 6th May 1998 when the petition was called out for hearing, he was busy in other court and, hence he could not remain present. Regarding the order passed by the learned Single Judge, Mr.Shah submitted that the learned Single Judge has committed an error of law in holding that the petition was not maintainable. He submitted that even if the order impugned in the petition was interlocutory in nature, it could not be said that no petition would lie against such order. At more than one place, the learned Single Judge, submitted Mr.Shah, observed that he was not expressing any opinion on merits of the matter as he was not of the view that the petition could not lie at that stage. According to Mr.Shah, in holding the petition not maintainable, the learned Single Judge has committed a serious error of jurisdiction and the order deserves interference by this court.

Mr. Ajay Sahani on the other hand supported the order passed by the learned Single Judge. He submitted that though the learned Single Judge at some places had observed that the petition was not maintainable, looking to the order as a whole and in its entirety, the learned Single Judge was of the opinion that in the facts and circumstances of the case, it was not a fit case to exercise jurisdiction under Art. 226 and/or 227 of the Constitution. He further submitted that it is clear from the reference made to two decisions of the Apex Court in *A.M. Allison v. B.L. Sen*, AIR 1958 SC 227 and *Balvant Rai v. M.N. Nagrashna*, AIR 1960 SC 407, . Mr. Sahani submitted that the order impugned in the petition was not final. The proceedings were still to go on. Against final order, an appeal is provided. The learned Single Judge has also observed that if the final order would be against the petitioner, it would be open to him to challenge the said order on all grounds. According to the learned counsel, therefore, if one looks at the substance of the matter and the circumstances under which the order passed by the learned Single Judge, it is clear that in exercise of extraordinary and/or supervisory powers, the court did not think it fit to interfere with the interlocutory order passed by the Asst. Registrar of Trade Marks.

Having heard the learned counsel for the parties, we are of the opinion that the appeal deserves to be allowed. The learned Single Judge has held that the petition was not maintainable. It is, no doubt, true, as submitted by Mr. Sahani that at various places observations have been made by the learned Single Judge considering the merits of the matter as also the scheme of the Trade and Merchandise Marks Act, 1958 and the Trade and Merchandise Marks Rules, 1959 and in the light of the facts and circumstances, the learned Single Judge observed that in such cases, ordinarily, a party should not invoke Art. 226 of the Constitution of India and the court may not interfere if such petitions are filed. At the same time, however, it cannot be gainsaid that the learned Single Judge has held the petition to be not maintainable. To that extent, in our opinion, the learned Single Judge was not right.

In our judgment, there is a clear distinction between non-tenability and non-maintainability of a petition by the court in exercise of the powers under Art. 226 and/or 227 of the Constitution of India. The former relates to maintainability and goes to the root of the jurisdiction of the court and a party is prevented at the threshold stating that he cannot enter the doors of

the court. The latter relates to discretion of the Court to exercise extraordinary jurisdiction in favour of a party. When the respondent contends that the court may not entertain the petition, he concedes to the jurisdiction of the court to entertain a petition. The court is also satisfied that it has power to entertain the petition. A court may, however, refuse to entertain a petition when it is of the view that though it has a power to entertain such petition and also to grant relief, on the facts and in the circumstances of the case, it is not inclined to grant such relief in favour of the petitioner.

In our opinion, in the instant case, it cannot be said that the petition was not maintainable. To that extent, therefore, the order passed by the learned Single Judge suffers from legal infirmity and cannot be upheld.

Mr. Sahani, drew our attention that looking to various paragraphs, it is clear that even on merits, the learned Single Judge has found substance in the contentions raised on behalf of respondent no.3. We express no opinion on that question as according to us, when the petition is maintainable, it has to be decided considering the facts and circumstances and the merits of the matter. Only on that ground the appeal deserves to be allowed.

In the result, the appeal is allowed. The order passed by the learned Single Judge is set aside. The matter will now go back to the learned Single Judge and the learned Single Judge will decide the same in accordance with law on its own merits. It is open to the parties to put forward the contentions available to them in accordance with law. It is also to the parties to request the learned Single Judge to take up the matter for early hearing. In the facts and circumstances of the case, the parties to bear their own costs.

Dt. 9.9.1998. (C.K.THAKKER J.)

(A.M.KAPADIA J.)